

RESTRICTION WITH TRAVERSE

In the Restriction Requirement, the Examiner asserts that the claims as filed are drawn to two (2) distinct inventions, and requires restriction to one of the listed inventions. The Examiner grouped the claims as follows:

I. Claims 1-16, and 31, drawn to a device, classified in class 623, subclass 1.24

II. Claim 30, drawn to a method of fabricating, classified in class 29, subclass 428+

The Examiner states that the groups are related as process of making and product made, and asserts that the groups are distinct because the product, as claimed, "can be made by a materially different process...."

Applicants respectfully traverse the need for restriction to one of the listed groups at least because searching all of the claims would not place an undue burden onto the Examiner. Applicants note that the Examiner has grouped all of the claims as filed into only two different classes. Applicants respectfully assert the belief that this does not present an unusually large number of classes, and that, as a result, the Examiner can conduct a thorough search for all claims in an efficient manner. Applicants respectfully assert that the claims, as filed, do not place an undue burden on the Examiner, and that restriction is unnecessary.

If the Examiner reconsiders the restriction requirement in light of the arguments above, Applicants respectfully request that the Examiner proceed to examine all pending claims in the application. If, however, the Examiner makes the restriction requirement final, Applicant hereby elect claims 1-16 and 31 (Group I) for current examination. This election is made with traverse and simply to further prosecution of this application.

Applicants make the election of claims 1-16 and 31 without prejudice or disclaimer. Further, Applicants reserve the right to resubmit the non-elected claims as well as submit additional claims directed to the non-elected group, either through rejoinder practice or otherwise.

ELECTION WITH TRAVERSE

In the Restriction/Election Requirement, the Examiner asserts that the application contains claims directed to the following patentably distinct species:

Set 1 (graft materials)

- A. extracellular matrix
- B. natural polymer

C. synthetic polymer

Set 2 (support frames)

X. Figure 3

Y. Figure 5

Z. Figure 7

ZA. Figure 8

ZB. Figure 9

ZC. Figure 10

ZD. Figure 11

ZE. Figure 12

Set 3 (graft to frame attachment elements)

i. barbs (Figure 17)

ii. projections (as in Figure 22C)

iii. C-shaped clips (Figure 28)

iv. Figure 29

v. Figure 30

vi. Figure 31

The Examiner characterized the species as “independent **or** distinct” simply because “they are mutually exclusive and there is nothing of record to indicate that they are obvious variants of each other.” (emphasis added). Based solely on this rationale, the Examiner indicated that the Applicants are required, under 35 U.S.C. §121, to elect a single disclosed species from each of the listed sets for prosecution on the merits.

The Applicants respectfully traverse the Examiner's election requirement at least because the Examiner has mischaracterized the statutory requirements that provide the authority for requiring election. Section 121 of the Patent Act specifically states, in pertinent part:

“If two or more independent **and** distinct invention are claimed in one application, the Director may require the application to be restricted to one of the inventions.”

By summarily concluding that the application contains claims directed to species that are “independent **or** distinct,” the Examiner has failed to demonstrate the independence and distinctness required for the use of the discretionary authority to require election that is provided by Section 121.

Accordingly, Applicants respectfully assert that the requirement for election is improper and request its removal.

If the Examiner reconsiders the election requirement in light of the requirements of 35 U.S.C. §121, Applicants respectfully request that the Examiner proceed to examine all pending claims. If, however, the Examiner makes the election requirement final despite this improper application of the statute, Applicants hereby elect the following species for current examination:

Set 1 – Species A

Claims 10 and 11 read on this species

Set 2 – Species ZD

Claims 1, 2, 3, and 10-16 read on this species

Set 3 – Species iv

Claims 1, 2, 3, and 10-26 read on this species

Applicants make this election with traverse and simply to further prosecution of this application.

Applicants make the election without prejudice or disclaimer. Further, Applicants reserve the right to pursue claims directed to the non-elected species, either through rejoinder practice, continuation and/or divisional practice, or through other available means.

CONCLUSION

Applicants believe this Reply to be fully responsive to the Restriction/Election Requirement mailed on April 5, 2007. If, however, the Examiner believes that additional communication is necessary, Applicants respectfully request that he contact the attorney listed below.

Respectfully submitted,

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